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Supreme Court, U.S.
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CLERK

No. 87-1069

Supreme Court of the United States

OCTOBER TERM, 1987

TERRY L. ARCOREN, PETITIONER

v.

WENTON PETERS AND JOHN SCHOOLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

IEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Iarch 1980 it was "clearly established,"
ing of *Harlow* v. *Fitzgerald*, 457 U.S. 800,
the Due Process Clause bars the Farmers
tration from using self-help remedies
ate secured creditors to repossess and sell
cures a debt.

Opinions below .....
Jurisdiction .....
Statement .....
Argument .....
Conclusion .....

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Cases:

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Bank, 487 F.2d
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Harlow v. *Fitzger*
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(1979) .....
Warren v. *Gove*
F.2d 1229 (8t
(1980) .....

Constitution, statute a

U.S. Const. Ame

U.C.C. § 9-503 .
7 C.F.R. 1900.53

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on:

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III)

In the Supreme Court

OCTOBER T

No. 87

TERRY L. ARCOR

v.

WENTON PETERS AN

ON PETITION FOR A WR
THE UNITED STATES
FOR THE EIGH

BRIEF FOR THE RESPON

OPINIONS

The opinion of the en banc
1-29) is reported at 829 F.2d 6
of appeals' panel (Pet. App. 3
392. The opinion of the distri
reported at 627 F. Supp. 151

JURISDI

The judgment of the court
September 25, 1987. The pet
was filed on December 24, 1
Court is invoked under 28 U.

STATE

1. Petitioner owned a ra
the time period relevant in
operating loans from the Fa

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OPPOSITION

appeals (Pet. App.
pinion of the court
eported at 811 F.2d
Pet. App. 48-60) is

als was entered on
a writ of certiorari
jurisdiction of this
4(1).

uth Dakota during
. He received two
me Administration

repossession on April 1 when he received
of sale for the cattle. *Id.* at 3, 49.

Petitioner pursued administrative rem
FmHA for redress of what he believed to
repossession of the loan collateral. See 7
(1980). When petitioner failed to obtain
menced this action against Peters and S
damages for alleged violations of due
guaranteed by the Fifth Amendment. C
Unknown Named Agents of Fed. Bure
403 U.S. 388 (1971). Petitioner claimed th
stitutional right to a hearing prior to the
sale of property covered by the security
that Peters and Schooler had violated
repossessing and selling the cattle withou

The district court held that the two FmH
entitled to immunity under the standard
Court's decision in *Harlow* v. *Fitzgeral*
(1982).[1] It concluded that "[a]lthough t
parently headed in the direction of requi
hearing prior to FmHA repossession of c
not be said that the law was 'clearly esta
point in March, 1980" (Pet. App. 60). Th
that the Uniform Commercial Code auth
to use self-help to take possession of colla
that a debtor defaults on his obligations
agreement and that prior notice to the de

[1] The district court initially held that petitioner
a *Bivens* action because the administrative remedi
tioner precluded the recognition of a *Bivens* actio
The court of appeals reversed that determinatio
availability of administrative remedies, "under
stances of this case, does not defeat an action bro
the fifth amendment to the United States constitu
141 (1985)). The court of appeals remanded the c
ceedings.

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The court of appeals noted that this Court in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), invalidated on constitutional grounds two state statutes authorizing the prejudgment seizure of property without notice to the property holder. This Court concluded that "due process requires 'an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another' " (Pet. App. 6, quoting *Fuentes*, 407 U.S. at 80 (emphasis in original)). The court of appeals observed that subsequent decisions had declined to extend *Fuentes* to self-help repossession by private creditors; "[t]hus, if a private creditor had financed [petitioner's] loan, the creditor would have been entitled under [state law] to take possession of the property without notice or a hearing in the event of default, and [petitioner] would have no claim that his constitutional rights were violated" (Pet. App. 7 (footnote omitted)).

The court then proceeded to reject petitioner's argument that the law in 1980 clearly established that the FmHA could not invoke the self-help statute to the same extent as a private creditor: "We do not believe that the cases clearly establish this proposition even as of today, much less as of 1980" (Pet. App. 7). The court stated that "strong authority" supported the FmHA employees' position that "when the FmHA acted as a lender, it acted in a commercial rather than a sovereign capacity." *Ibid.*, citing *United States* v. *Kimball Foods, Inc.*, 440 U.S. 715 (1979). The court acknowledged that the Due Process Clause applies to the FmHA's actions, but concluded that the nature of the governmental function and the fact that the agency was exercising its authority under the security agreement distinguished the present situation from *Fuentes*. It added that in cases involving government-owned corporations, courts had concluded that self-help remedies could be utilized without prior notice. Because there was a

" 'legitimate question' as to what process was due [petitioner] in these circumstances," the court concluded that the FmHA employees did not violate clearly established law by invoking the statutory self-help remedy. Pet. App. 12.[2]

Two judges dissented. They concluded that petitioner had a clearly established right to a pre-repossession hearing at the time of the events at issue in this case. Pet. App. 15-29.

ARGUMENT

Petitioner's arguments before this Court are based on a complete misreading of the court of appeals' opinion. Contrary to petitioner's repeated claims (see, *e.g.*, Pet. 7, 8, 17), the court of appeals did not hold that an individual in petitioner's position has no due process right to a hearing prior to repossession of goods by the FmHA. The court simply held that such a right was not clearly established in 1980 (Pet. App. 2, 12). That narrow determination does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. The scope of the immunity from personal liability available to executive government officials such as respondents is well established: "[G]overnment officials per-

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[2] The court of appeals also rejected petitioner's claims for damages based upon the provisions of the security agreement, the FmHA regulations, and South Dakota law, observing that "[a] *Bivens* action for damages * * * must be founded upon a violation of constitutional rights" (Pet. App. 12). It further stated that "there is no provision [in the statutes, regulations, or security agreement] that clearly establishes the right to notice and hearing *before* FmHA officials could determine that [petitioner] was in default" (*id.* at 13 (emphasis in original)). Therefore, "the provisions cited by [petitioner] do not bear upon the constitutional analysis concerning what process was due" (*id.* at 15).

forming discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), slip op. 3. The Court recently defined the circumstances in which a right is "clearly established," explaining that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" (*Anderson* v. *Creighton*, slip op. 4). Although the precise conduct need not have previously been held unlawful, "in the light of preexisting law the unlawfulness must be apparent" (*id.* at 5).[3]

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[3] Petitioner asserts (Pet. 19-23) that the court below applied the wrong standard in assessing respondents' entitlement to immunity, but petitioner has confused the immunity standard with the application of that standard to the particular facts of this case. The court of appeals plainly applied the correct standard. It quoted the pertinent portion of *Harlow* (see Pet. App. 4-5), and proceeded to determine whether the right claimed by petitioner was clearly established at the time of the challenged conduct (see *id.* at 5-12).

Petitioner asserts (Pet. 21) that the court of appeals created a new immunity rule that "depends upon whether the nature of [the official's] actions is sufficiently 'private' so as to relieve him of an obligation to comply with the Constitution." But the court of appeals created no new immunity rule. It found the quasi-commercial nature of the challenged conduct germane in assessing the scope of the relevant constitutional right, concluding that the manner in which the Due Process Clause applied to commercial activities undertaken by a government entity was uncertain in March 1980 and that, therefore, respondents were entitled to immunity (Pet. App. 7-12). Petitioner also states (Pet. 22) that respondents should not be entitled to immunity on the court of appeals' view of the case because immunity is available only for government actions. Contrary to petitioner's contention, the court of appeals recognized that respondents' conduct amounted to governmental action (see, *e.g.*, Pet. App. 8); the court

e court of appeals correctly applied that standard to
nstitutional claim asserted by petitioner in this case.
threshold matter, petitioner has pointed to no deci-
ssued prior to March 1980 that addresses the precise
on presented in this case. Indeed, petitioner
wledges that no decision "explicitly [struck] down
elp repossession by government officials as un-
tutional" (Pet. 15).

ther was the unlawfulness of respondents' actions
rent" in light of then-settled legal principles. At the
f the events at issue here, an unreconciled tension
l between two generally recognized propositions.
this Court had held that prior notice and an oppor-
to be heard were constitutionally required in con-
n with some government actions effecting a deprива-
f property. In *Goldberg* v. *Kelly*, 397 U.S. 254
, the Court held that a recipient of welfare benefits
e afforded an evidentiary hearing prior to the ter-
on of such benefits. And in *Fuentes* v. *Shevin*, 407
7 (1972), the Court invalidated two state statutes
izing the seizure of property without notice to the
ty holder, holding that due process required notice
opportunity for a hearing prior to the seizure of the
ty.[4]

nd, it was well established that, in some circum-
, a secured creditor may use self-help to repossess
ral from a defaulting debtor. See U.C.C. § 9-503;
p. 6-7. Several courts, including the Eighth Circuit,

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oncluded that the Due Process Clause might apply differently
commercial activities such as those at issue here.

he other hand, in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600
the Court upheld the constitutionality of a state statute
ing the issuance of an ex parte sequestration order that
a property owner of the possession of personal property
any prior notice or opportunity for a hearing. Thus, the scope
uentes rule was not completely clear.

concluded that *Fuentes* did not apply in this context hat private creditors were therefore free to use self- remedies without providing prior notice and an op- nity for a hearing. *Bichel Optical Laboratories, Inc. arquette National Bank*, 487 F.2d 906 (8th Cir. 1973); App. 6-7.

titioner has not pointed to any authority that made it arent" in March 1980 that the FmHA's use of the self- remedy should have been analyzed under the first of principles rather than the second.[5] Indeed, what ority there was at the time indicated that the FmHA d make use of the self-help remedy to the same extent in the same manner as a private creditor. In *United es* v. *Kimball Foods, Inc.*, 440 U.S. 715, 737 (1979) tion omitted), this Court characterized the FmHA as a asi-commercial lender,' " and held that the priority to ccorded an FmHA lien should be determined by refer- to general state priority rules; the Court declined to te a special priority rule similar to that accorded to tax because the "[g]overnment * * * is in substantially same position as private lenders" (*ibid.*). Although the acterization of the FmHA's actions for due process

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Petitioner cites (Pet. 14-15) everal district court decisions, but of those decisions addresses the process due in connection with FmHA's use of self-help repossession remedies; they all concern ue process requirements applicable to mortgage foreclosures. Ac- ingly, those cases do not supply clear guidance as to the ap- ble rule in the self-help repossession context. The relevance of e cases is further diminished by the fact, recognized by the court w (Pet. App. 8-10), that several courts of appeals had reached the rary conclusion regarding the need for prior notice and an oppor- y to be heard in the related context of mortgage foreclosures by rnment-owned corporations. See note 6, *infra*. Finally, one of the s cited by petitioner—*Rau* v. *Cavenaugh*, 500 F. Supp. 204 .D.)—was not decided until November 1980, more than seven ths after the events at issue in this case.

ously a different question from the issue in *Kimball Foods*, the Court's conclusion closely resembles a private lender and l be governed by the priority rules ap- te lenders certainly makes less "apparent" hat self-help remedies available to private not be available to the FmHA.[6]

most striking evidence that the right ioner was not clearly established in March n the views of the judges who considered Nine of eleven judges of the court of ap- t court concluded that the constitutional petitioner was not clearly established at e, and the court of appeals stated that "it for us to hold that in 1980 the law was ed that the FmHA officials could act as App. 12). It is implausible in the extreme

appeals found (Pet. App. 8-10), this conclusion is by several appellate decisions analogizing corporations to private lenders for the purpose of uisites of due process in connection with those en- nortgage foreclosures. See *Warren* v. *Government Ass'n*, 611 F.2d 1229 (8th Cir.), cert. denied, 449 *oberts* v. *Cameron-Brown Co.*, 556 F.2d 356 (5th p v. *Federal National Mortgage Ass'n*, 527 F.2d 23 ese courts relied in large part upon the fact that the performed by government-owned corporations government itself. But they also found significant ght to foreclose flowed from a provision contained t: "As a party to the contract, and even though it lly-owned and authorized entity, [the government-] had a right to resort to its contractual remedies ate entity had." *Warren*, 611 F.2d at 1234; see also 2d at 32. Officials such as respondents could that the same rule applied to the quasi-commercial HA, especially in the absence of any authoritative ning the two situations.

that the federal clearly a reason

2. P below *Agricul* class a FmHA of appe a preli the liti minati were li foreclo had no ty to b

The tion i the ap foreclo the d was c factu sessio

[7] Pe the pr mary concl tually his pr such origi have *tiona*

whelming majority of a group of sitting
should fail to recognize a legal right so
hed as to be chargeable to the knowledge of
ublic official.[7]

er contends (Pet. 17-18) that the decision
s with *Johnson* v. *United States Dep't of*
34 F.2d 774 (11th Cir. 1984). *Johnson* was a
allenging the procedures employed by the
-judicial mortgage foreclosures. The court
d that the district court should have granted
injunction barring such foreclosures while
as underway. In connection with that deter-
court of appeals found that the plaintiffs
succeed on the merits of their claim that the
iolated due process because the plaintiffs
rovided with prior notice and an opportuni-
(see 734 F.2d at 782).

n *Johnson* bear no relationship to the ques-
esent case. *Johnson* addressed the merits of
n of the Due Process Clause in the mortgage
ntext; the issue in the present case is whether
ss rule applicable to self-help repossession
tablished in 1980. The difference in the two
ts—mortgage foreclosure as against repos-
fficient to distinguish the two cases. Bu

ntends (Pet. 14 n.2) that factual disputes regarding
repossession in this case precluded an award of sum-
n favor of respondents. The district court correctly
ver, that it is immaterial whether petitioner was ac-
because "[petitioner] seeks relief for deprivation of
out prior notice and hearing. It is undisputed that no
earing were provided" (Pet. App. 49 n.2 (emphasis in
t it another way, the fact that the repossession might
ful has no bearing upon whether petitioner's *constitu-*
ior notice and hearing was clearly established.

mental distinction. *Johnson* ticular constitutional claim, ere likely to succeed on the resent case is limited to the s are entitled to immunity; t by determining the correct rse taken by the court in the state of the law in March 0 rule would be found to be ons, there is plainly no con- ns.

USION

certiorari should be denied.

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ES M. SPEARS
cting Assistant Attorney General
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torney

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